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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1257

WALTER D. SCHMIER,

Appellant,

vs.

Trustees of the
CALIFORNIA STATE UNIVERSITY AND
COLLEGES, et al.,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

Appellees move the Court to dismiss the appeal herein on the ground that no substantial federal question is presented by the appeal.

INTRODUCTION

The opinion of the California Court of Appeal, attached to the Jurisdictional Statement as Appendix B, adequately sets forth the factual and procedural matters which have transpired, and accurately represents appellant has sought and exhausted his state judicial remedy.

ISSUE

Did appellees, the Trustees of the California State University and Colleges and San Diego State University, violate appellant's constitutional rights by terminating appellant upon his 67th birthday in accordance with California Government Code section 20981?[1/]

1/ Section 20981, California's age-based mandatory retirement law, has been effectively repealed by the enactment of California Assembly Bill No. 568 (Stats. 1977, Ch. 851).

WHY THE COURT OF APPEAL WAS CORRECT

CALIFORNIA'S AGE-BASED MANDATORY RETIREMENT LAW ALTHOUGH EFFECTIVELY REPEALED, WAS CONSTITUTIONAL.

Appellant contends California's age-based mandatory retirement law which has been effectively repealed, violates his constitutional rights. Specifically, appellant contends California Government Code section 20981 violates his right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Appellees respectfully assert appellant's contentions have been the subject of numerous federal and California cases, and present an insubstantial federal question.

Initially, the California Supreme Court, in a recent benchmark decision entitled *Miller v. State of California*, 18 Cal.3d 808 (1977) stated:

> "[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such appointment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (Extensive citations.) (18 Cal.3d at 813-814.)

California Government Code section 20981 required that public employees retire on the first day of the calendar month next succeeding their 67th birthday. While section 20981 has not been the subject of federal review, numerous other state

retirement provisions have been reviewed by the federal courts in light of the identical assertions advanced by appellant.

In *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1974) the mandatory retirement of state police officers at age 60 was upheld. This Court dismissed the appeal for want of a federal question. In *Rubino v. Ghezzi*, 512 F.2d 431 (2nd Cir. 1975) the mandatory retirement of state judges at age 70 was upheld. The court found the issue presented an insubstantial constitutional inquiry and refused to convene a three judge court. This Court denied certiorari. 423 U.S. 891 (1975)

In *Weisbrod v. Lynn*, 383 F.Supp. 988 (D.D.C. 1974) the mandatory retirement of federal civil service employees at age 70 was upheld. This Court affirmed the decision on appeal at 420 U.S. 940 (1975). Finally, in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) the mandatory retirement of state police officers at age 50 was upheld. Consequently, appellees assert state and federal mandatory retirement provisions have been challenged without success before this Court, and as such, appellant does not present a substantial federal question.

Most recently, the Court of Appeal in *Johnson v. Lefkowitz*, 566 F.2d 866 (2nd Cir. 1977) (Cert. Pend. 77-1444) affirmed, in every respect, the state's right to mandatorily retire public employees. In affirming the state's motion to dismiss, the court held, *inter alia*, that mandatory retirement provisions were rational and legitimately served the state's interest. In so finding, the court stated:

> "Accordingly, the state need only articulate a rational basis for its statutory scheme. It would appear without question that (the mandatory retirement provision) is reasonably related to legitimate state interests in efficiency and economy. A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks. And the statute before us, which permits some employees to continue in their jobs until the age of 78, serves these legitimate state purposes without needless prejudice to the greater number of qualified employees." (Page 869.)

In the present case, the California Court of Appeal relied upon *Townsend v. County of Los Angeles*, 49 Cal.App.3d 263 (1975) in affirming appellant's mandatory retirement. In response to appellant's Fourteenth Amendment assertions, the court in *Townsend* stated:

> "We find nothing arbitrary, discriminatory or unreasonable in establishing maximum retirement ages. Plaintiff's assertions of arbitrariness assume that the sole issue in determining the validity of mandatory retirement ages is the job effectiveness and protection of current jobholders. [illegible], however, mandatory retirement increa[illegible] opportunity for all qualified persons to share in public employment and permits governmental units to plan for orderly attrition through lowe retirement ages, or orderly growth throug higher retirement ages.

The purposes of mandatory retirement age in a public employment system were well stated in Armstrong v. Howell (D. Neb. 1974) 371 F.Supp. 48, in which case, as here, the county adopted a mandatory 65-year-old retirement age after the plaintiff had been employed by the county. The court, in declining to strike down the system as irrational and arbitrary, ruled: 'Not all discrimination between classes of persons is violative of the law, the test being whether any distinctions which are drawn are rationally related to the purposes for drawing or making the distinctions. In the instant case, this Court is of the opinion that the mandatory retirement provisions in question achieve a permissible and logical end, and further, that the means chosen are reasonable and rational. The stated purpose of the Act was to guarantee to all citizens a fair and equal opportunity for employment in County offices governed by the Act and to establish conditions of employment and to promote economy and efficiency in such offices.' (371 F.Supp. at page 53.)" (Pages 268-269.)

Consequently, rational bases exist to justify and affirm age-based mandatory retirement. As such, appellant's constitutional arguments are without merit and do not present a substantial federal question.

AS CALIFORNIA'S MANDATORY RETIREMENT LAW HAS BEEN EFFECTIVELY REPEALED, THE PRESENT APPEAL DOES NOT RAISE A FEDERAL QUESTION OF SUBSTANCE.

At the time appellant was retired, California Education Code section 24207 required:

> "The employment of any employee of the trustees . . . shall terminate on the first day of the calendar month next succeeding that in which he attains mandatory retirement age. . . ."

California Government Code section 20981 set the mandatory retirement age in the State of California at 67 years. In accordance with both sections, appellant was retired on the first day of the calendar month following his 67th birthday.

During the pendency of the state court proceedings, the California Legislature effectively repealed the mandatory retirement law through the enactment of Assembly Bill No. 568 (Stats. 1977, CH. 851). By the passage of Assembly Bill 568, section 20983.5 was added to the California Government Code and reads:

> "Notwithstanding any provision of law, every state member who has attained age 67, other than a patrol or state safety member, shall have the right to continue in employment upon certification of the member's competence in his position by the department or agency head or other appropriate supervisor pursuant to the rules and regulations adopted by the

> State Personnel Board, the Regents of the University of California, or Trustees of the California State University and Colleges with respect to employees under their respective jurisdictions. In such case, the effective date of retirement shall be delayed until the day following the last day for which salary is payable. The member shall be subject to the same rights and liabilities as other members and employer and members contributions shall continue until retirement or until death before retirement."

As a result, appellees' employees are no longer subject to mandatory age-based retirement, but rather, employment based solely upon an employee's competence. In light of the effective repeal of California's mandatory retirement law, appellees respectfully assert "special and important reasons" no longer exist to entertain the present appeal, nor is a federal question "of substance" raised by appellant.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court was faced with a procedural matter nearly identical to the circumstances of the present appeal. In *Rice*, plaintiff attacked the constitutional validity of a contract clause in an Iowa State Court which held that no state or federal action was involved and dismissed the case. The Supreme Court of Iowa affirmed and this Court granted certiorari (347 U.S. 942).

Plaintiff's case was argued and this Court was evenly divided. By necessity, this Court affirmed the decision of the Iowa Supreme Court. A petition for rehearing was filed in which it appeared that an Iowa statute, enacted since the commencement of the litigation, barred the ultimate question

presented in the case from again arising in Iowa, though the statute was inapplicable to plaintiff's case. This Court reviewed its discretionary power of review upon writ of certiorari; the "special and important reasons" for granting the writ of certiorari as required by Supreme Court Rule 19; and granted the petition for rehearing. Ultimately, the judgment of affirmance was vacated and the writ of certiorari dismissed as improvidently granted. In so holding, Mr. Justice Frankfurter stated:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But his court does not sit to satisfy a scholarly interest in such issues. Not does it sit for the benefit of the particular litigants. (citations omitted) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." (At page 74.)

Appellees recognize the present matter was not brought to this Court by way of petition for certiorari; however, appellees assert the same fundamental considerations apply to direct appeals. As California has effectively repealed its age-based mandatory retirement law (which occurred, as in *Rice*, during litigation), it would appear the present appeal is more an "intellectually interesting" problem then a federal question "of substance."

CONCLUSION

For the reasons above stated, appellees respectfully assert this Court should apply its discretionary power of review in this matter and grant appellees' motion to dismiss.

Respectfully submitted,

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